1968

State of Utah v. Tony Renzo : Brief of Plaintiff-Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

TONY RENZO,
Defendant-Appellant

Case No. 11038

Brief of Plaintiff-Respondent

Appeal from the Judgment of the Third District Court, Salt Lake County, State of Utah Honorable Bryant H. Croft, Judge

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STATEMENT OF THE NATURE OF CASE

The appellant, Tony Renzo, appeals from a conviction of the crime of manslaughter in violation of Utah Code Ann. § 76-30-5 (1953), on trial by jury in the Third Judicial District Court, Salt Lake County, State of Utah, the Honorable Bryant H. Croft presiding.

DISPOSITION IN THE LOWER COURT

The appellant was charged by information with the crime of murder in the first degree. A jury trial was held on June 12-15, 1967. The jury returned a verdict on the lesser offense of voluntary manslaughter and the Honorable Bryant H. Croft imposed sentence on the appellant of confinement in the Utah State Prison for the indeterminate term as provided by law of not less than one nor more than ten years.

RELIEF SOUGHT ON APPEAL

The respondent submits that the judgment of the Third District Court should be affirmed.

STATEMENT OF FACTS

The respondent, State of Utah, submits the following evidence of facts as being more in keeping with the rule that evidence will be reviewed on appeal in a light most favorable to the verdict below.

In the early morning of February 28, 1965, Salt Lake City Police officers were called to a local residence to investigate the death of one Bertha Magera (R. 150). The residence was strewn with pieces of human flesh (R.259), human hair was found in several rooms (R. 262), and there were large areas of dried human blood in the bedroom where the deceased was discovered and in the kitchen (R.171).

Evidence was adduced showing that appellant and deceased had been seeing one another for several months previous, and that appellant had a vicious temper and occasionally resorted to physical punishment of the deceased (**R.470**).

On the evening of February 27, 1965, appellant and one Clarence Williams entered the deceased's home and remained there for some three to four hours (R. 334). All three were drinking when appellant began to attack Mr. Williams, hitting him in the face and kicking him while Williams lay on the kitchen floor close to unconsciousness (**R.337**).

While on the floor Williams heard an argument between deceased and appellant, then felt Bertha's body striking his and appellant saying "If you want her you can have her." (**R.338**). When Williams regained consciousness, both appellant and deceased had left the kitchen area but could be heard arguing in another portion of the residence (**R.339**).

Appellant then returned to the kitchen area and began mopping up the blood which had spilled on the floor (**R.339**).

Appellant and Williams then left the residence with appellant returning early the next morning (R. 363). Two women friends of appellant entered the residence at that time and discovered the nude body of the deceased on a bed in the bedroom. Appellant was requested to remain, but refused to do so and struck

one of the women as she attempted to restrain him (R.367).

Police officers took appellant into custody and found his clothing and shoes covered with reddish brown stains which appeared to be blood (R397).

An autopsy was performed on the deceased which revealed multiple bruises covering the face, arms, trunk, buttocks, and legs; several tears in the wall of the vagina, and multiple fracturing of the ribs with one of the fractured ribs puncturing the right lung (T.221-227). The vaginal tearing could have been caused by a bamboo stick, (state's exhibit No. 38), found in the deceased's home with what appeared to blood on it (T.180, 224). The primary cause of death was respiratory failure due to the fracture of the chest wall and the resultant inability of the chest wall to move with respiration, together with the collapsed lung (T.228).

ARGUMENT

POINT I

APPELLANT SUFFERED NO DENIAL OF THE RIGHT TO SPEEDY TRIAL.

Appellant would have this court view the time from the filing of the complaint against him in February, 1965, until his trial in June, 1967, as a legal continuum which, providing there was no waiver of speedy trial by

appellant, would constitute a twenty-seven month delay that could raise serious constitutional questions of speedy trial.

Respondent submits, however, that this is not a proper view of the circumstances presented by appellant's case. Insofar as the events of 1965 are concerned, as those proceedings stood at dismissal, the threshold of the constitutional speedy trial guarantee had not yet been reached. The dismissal, coming at the end of preliminary hearing, stopped the process short of binding appellant over for trial.

The rule is firmly established that the protection of speedy trial afforded by the Sixth Amendment has no application until after a prosecution is instituted. *Foley v. United States,* 290 F.2d 562 (8th Cir. 1961), cert. denied, 368 U.S. 888, 82 Sup. Ct. 139, 7 L.Ed.2d 88 (1961), also holding that prosecution is not instituted until an indictment is returned or an information is filed.

The guarantee of speedy trial does not apply from the time of arrest to the time defendant is bound over for trial. *State v. Enriquez,* 102 Ariz. 402, 430 P.2d 422 (1967).

Guarantee of speedy trial does not apply to preliminary hearing, but rather, to trial held after indictment is returned or information filed, and at which the issue of guilt or innocence is to be determined. *State v. Lee,* 197 Kan. 463, 419 P.2d 927 (1966).

Utah Code Ann. § 77-1-8(6) (1953), which this court has held in *State v. Rasmussen,* 18 Utah 2d 201, 418 P.2d 134 (1966), to be the statutory implementation of federal and state constitutional guarantees to speedy trial, speaks only of expediting the proceedings after arraignment.

Respondent submits, therefore, that since the 1965 proceedings were dismissed after preliminary inquiry, the appellant not being bound over for trial, charged by information, or arraigned, the constitutional rights to speedy trial were not applicable at the stage of the proceedings at which dismissal was granted. That right did not attach until appellant was bound over for trial and was charged by information in April, 1967, and thus, it cannot be said he was denied a speedy trial.

If this court determines that the constitutional speedy trial protections were applicable to the 1965 proceedings, they were satisfied by the dismissal occurring slightly over a month from the time of arrest and had no application to appellant from that time until the subsequent institution of proceedings. The facts presented demonstrate two distinct legal proceedings.

Respondent submits that the proper scope of applicability of the constitutional speedy trial protections, and its outer limits in such cases, is illustrated by the recent United States Supreme Court decision in *Klopfer v. North Carolina,* 386 U.S. 213 (1967), which is clearly distinguishable from the case on appeal. There, the Court was faced with a peculiar procedural device

allowing the prosecution to enter a "nolle prosequi with leave" which permitted the solicitor to reinstate the case at any time without further court order. Its entry tolled the statute of limitations as well, and thus subjected a defendant to an unlimited pendency in which the state could proceed at will without the necessity of a further showing of probable cause. In holding this to be violative of the petitioner's Sixth Amendment right to speedy trial guaranteed by the Fourteenth Amendment, the Court concluded that such indefinite pendency might subject the petitioner to public scorn, loss of employment, and indefinitely continue the anxiety accompanying public accusation.

Appellant, on the other hand, after a complete dismissal, stood in society as completely absolved; one against whom not even probable cause had been found. The statute of limitations was not tolled. A showing of probable cause still had to be made to bring him within the judicial process. He had, in fact, not been prejudiced.

Respondent submits that the decision of the District of Columbia Court of Appeals in the case of *United States v. Young,* 237 A.2d 542 (1968), on which appellant relies, wrongly equates the situation in that case (a dismissal and the later institution of like proceedings) with the practice condemned in *Klopfer v. North Carolina, supra.* The decision reached in *State v. Ackerman,* 27 Conn. Supp. 209, 234 A.2d 120 (1967), is more nearly within the rationale of the *Klopfer* case.

There it was held that a nolle prosequi, when unconditionally entered, was a dismissal; and as no conviction could be had except by beginning a new case against defendant. *There was no case pending against him,* and the right to speedy trial was not denied defendant when a new complaint was filed fifteen months later under either the Sixth Amendment or the state constitutional guarantee.

Assuming the extension of the *Klopfer* case in *United States v. Young, supra,* to be viable, this case is clearly distinguishable. First the defendant was charged by information prior to the dismissal of the first proceeding while appellant was not; and thus, as has been previously demonstrated, the threshold of the speedy trial guarantee was reached in that case, but was not reached in the instant case. Second, the court there found prosecution had been deliberately delayed, which from the record, cannot be said of the present case.

As for the claimed prejudice resulting to defendant, the state cannot be charged with it under these circumstances, just as it cannot be charged with any prejudice that may result prior to the institution of proceedings, absent a showing of deliberate delay to gain prosecutorial advantage. *United States v. Harbin,* 377 F.2d 78 (9th Cir. 1967).

The record here does not show such deliberate delay, and such showing cannot be made by unsupported allegations of appellant. As the speedy trial guarantee was not applicable to appellant in the 1965 proceedings,

it was not applicable to him in the intervening time until institution of proceedings some months later. If it were applicable to him in 1965, it was satisfied by the dismissal; thus, again, was not applicable to him in the intervening time.

While defendants have a constitutional right to speedy trial, they have no right to a prosecution speedier than that laid down by the statute of limitations. *People v. Douglas*, 54 Cal. Rptr. 777 (1967), citing *People v. Jordan*, 45 Cal.2d 697, 290 P.2d 484 (1955); *People v. Ciavarella*, 44 Misc.2d 792, 255 N.Y.S.2d 108 (1964).

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EXHIBITS 29 AND 34 AS THEY WENT TO PROVING THE ESSENTIAL ELEMENTS OF THE CRIME CHARGED, WERE RELEVANT, PROBATIVE, AND WERE NOT INTRODUCED TO INFLAME THE JURY.

Appellant contends that the admission into evidence of state's exhibit Nos. 29 and 34 was error. The exhibits consisted of two colored slides, both of the body of the decedent in the position and condition it was found at the scene of the crime. Exhibit 29, a photo taken from the foot of the bed on which the body was discovered, demonstrated the bruises on the legs and damage to the vaginal area. Exhibit 34 was a photo dem-

onstrating the damage to the vagina, with that organ distended by the examining physician's fingers.

The admissibility of photographs is a matter of judicial discretion and will not be disturbed unless it amounts to an abuse of discretion. *State v. Jensen*, 209 Ore. 239, 296 P.2d 618 (1956), *People v. Schiers*, 160 Cal. App.2d 364, 324 P.2d 981 (1968), *Martinez v. People*, 124 Colo. 170, 235 P.2d 810 (1951).

On the subject of admission of such evidence, the Oregon State Supreme Court has stated in *State v. Jensen, supra,* at 296 P.2d 634-35:

> These [alleged errors] relate to the admission in evidence of so-called 'gruesome' exhibits over defendant's objections. They consist of photographs of the body of the victim of the homicide . . . It is too late today to contend that in a capital case evidence which might shock the sensibilities of jurors is for that reason inadmissible. . . . Counsel for defendant does not so contend, but argues that the exhibits were irrelevant. Of course, to bring into the case wholly irrelevant evidence of a gruesome character merely for the purpose of exciting feelings of hate on the part of the jury against the defendant would be indefensible and intolerable. On the other hand, the prosecution, with its burden of establishing guilt beyond a reasonable doubt, is not to be denied the right to prove every essential element of the crime by the most convincing evidence it is able to produce. No one would be heard to object to testimony which does no more than faithfully describe the wounds which were inflicted upon the victim of a homicide, no matter

how horrifying the narration might be. But a photograph of the corpse may fortify the oral testimony. Should it be excluded because it is, perhaps, even more revolting? We think not, as long as the defendant stands upon his plea of not guilty and the burden remains with the state of proving that the victim met death by the criminal agency alleged in the indictment.

In these matters much is to be left to the discretion of the trial judge. The test is not whether the case might have been fully proved without the evidence objected to, but whether such evidence tends to establish the truth of the charge.

The state here had the burden of proving appellant guilty beyond a reasonable doubt of the crime charged, that of first degree murder. To do so, it necessarily had to prove the elements of that crime; enumerated in Utah Code Ann. § 76-30-3 (1953), which in part provides:

> Every murder perpetrated by poison, lying in wait or any other kind of wilful, deliberate, malicious and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than the one who is killed; or perpetrated by any act greatly dangerous to the lives of others and evidencing a depraved mind, regardless of human life;—is murder in the first degree. . . .

Further, the entire entry of a plea of not guilty puts in issue every material allegation of the information. Utah Code Ann. § 77-24-4 (1953).

Colored slides of the deceased were held properly admitted for their probative value in demonstrating *malice aforethought,* and whether defendant had an abandoned and malignant heart at the time of the killing and there admissibility, was not an abuse of discretion even though they were gruesome. *People v. Taylor,* 11 Cal. Rptr. 480 (1961).

In answer to a defendant's contention that photos of the body of deceased on the bed where she was found, and autopsy pictures taken later should have been excluded, the court in *People v. Toth,* 6 Cal. Rptr. 372 (1960), replied:

> In the trial of a charge of murder in the second degree it is essential for the People to establish malice aforethought. Such malice may be shown by the extent and severity of the injuries inflicted upon the victim and by the condition in which the victim was left by her attacker.

Such photos have also been held admissible: To show the condition of the body, or to indicate the nature or extent of wounds or injuries thereon, *Reizenstien v. State,* 165 Neb. 865, 87 N.W.2d 560 (1958), manner of death, location, severity, and number of wounds, *State v. Eubanks,* 240 La. 552, 124 So.2d 543 (1966), amount of force used, *People v. Kolep,* 29 Ill.2d 1160, 193 N.E. 2d 753 (1963), and the severity and violence of the assault on the deceased, *Commonwealth v. Raymond,* 412 Pa. 194, 194 A.2d 150 (1963); the fact that such photos may be gruesome notwithstanding.

In a very recent Idaho murder case, the defendant was charged with murdering a three year old child by kicking it to death. The court there held that the charge involved the element of malice with which the crime was committed and photographs showing the battered nude body of the deceased helped to establish the malice. *State v. Martinez,* .... Idaho ...., 439 P.2d .... (April 15, 1968).

The court, in rejecting defendant's claim that these photographs had no probative value and served only to arouse the passions of the jury, stated at 439 P.2d ....:

> The general rule is that photographs of the victim in a prosecution for homicide, duly verified and shown by extrinsic evidence to be faithful representations of the victim at the time in question are, in the discretion of the trial court, admissible in evidence as an aid to the jury in arriving at a fair understanding of the evidence, proof of the corpus delicti, extent of injury, condition and identification of the body, or for their bearing on the question of the degree or atrociousness of the crime, even though such photographs may have the additional effect of tending to excite the emotions of the jury. (See generally 23 C.J.S. Criminal Law Sec. 852[1] [1961]; 29 Am. Jur.2d Evidence Secs. 785-788 and 798 [1967]; 159 A.L.R 1413 [1945]. 73 A.L.R.2d 769 [1960]. See also State v. Kleier, 69 Idaho Idaho 278, 206 P.2d 513 [1949].)
>
> The generalizations above referred to have been specifically applied with respect to homicide cases involving the admissibility into evidence of photographs for the designated purpose of

determining the atrociousness or malice with which the crime was committed.

CONCLUSION

Respondent submits that appellant was not denied the right to speedy trial and that the trial court did not abuse its discretion in admitting the exhibits complained of. The court should affirm.

Respectfully submitted,

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